

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JANINE L. HURLBURT**

## Claimant

VS.

**T-MOBILE USA, INC.**

Respondent

AND

**TRAVELERS PROPERTY CASUALTY COMPANY  
OF AMERICA**

Insurance Carrier

Docket No. 1,021,535

## ORDER

Before her death, Janine L. Hurlburt<sup>1</sup> appealed the July 27, 2009, Review and Modification award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on October 16, 2009.

## APPEARANCES

W. Walter Craig of Derby, Kansas, appeared for the decedent. Lyndon W. Vix of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the July 27, 2009, Review and Modification award. The record also includes the November 21, 2006, Post-Award Motion Hearing transcript; the February 19, 2009, Motion Hearing transcript with attached exhibits; the record set forth in the June 20, 2006, Award and June 26, 2006, Award Nunc Pro Tunc entered by Special Administrative Law Judge Marvin Appling; and the administrative file compiled by the Director of the Division of Workers Compensation.

<sup>1</sup> Mr. Craig represents that Ms. Hurlburt died on August 20, 2009, which was after she initiated this appeal. As of the date of oral argument, no party had been substituted for Ms. Hurlburt.

### ISSUES

This is a proceeding to review and modify an award in which Ms. Hurlburt received permanent partial disability benefits under K.S.A. 44-510d for a 7.65 percent impairment to the right upper extremity at the forearm level and a 7.65 percent impairment to the left upper extremity at the forearm level. In the July 27, 2009 Review and Modification award, Judge Klein denied Ms. Hurlburt's request for permanent total disability benefits. Ms. Hurlburt appealed that decision to this Board. Shortly after perfecting this appeal, Ms. Hurlburt died.

At oral argument before the Board on October 16, 2009, discussion was limited to Mr. Craig's standing to proceed in this appeal, the Board's jurisdiction, and whether a party should be substituted in place of Ms. Hurlburt.

Mr. Craig, who represented Ms. Hurlburt in this claim, argues that this appeal may proceed without substituting any party for Ms. Hurlburt as her estate is insufficient to require any type of formal administration. Mr. Craig also represents claimant left a sister, who is claimant's only heir. Mr. Craig contends that because there is no procedure in the Workers Compensation Act that addresses substitution of parties upon a party's death this appeal should proceed. He acknowledges that he does not have a contract to represent either Ms. Hurlburt's estate or her alleged sole heir. In short, Mr. Craig maintains filing a probate proceeding for the appointment of a representative to pursue this appeal is both an unnecessary act and expense.

Conversely, respondent argues this appeal cannot proceed until a real party in interest is substituted for the decedent. Citing an earlier Board decision,<sup>2</sup> respondent maintains that the "Board lacks jurisdiction [to] issue any substantive Order unless and until a proper party is substituted for the claimant."<sup>3</sup> Accordingly, respondent requests this appeal be stayed until an estate is opened, an estate representative named, and that representative substituted as claimant in place of the decedent. Respondent also suggests that "the Board may wish to remand the matter to the ALJ in order to accomplish substitution once an estate has been opened and claimant's heirs are determined."<sup>4</sup>

The only issue now before the Board is whether Mr. Craig can proceed with this appeal in light of Ms. Hurlburt's death and the absence of another party being substituted as the claimant in place of the decedent.

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<sup>2</sup> *Walden v. B. A. Barnes Electric, Inc.*, No. 220,421, 2006 WL 3298917 (Kan. WCAB Oct. 13, 2006).

<sup>3</sup> Respondent's Motion at 4 (filed Sept. 22, 2009).

<sup>4</sup> *Id.*

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

The Workers Compensation Act does not specifically address whether substitution of parties is required upon a party's death. The Board is unaware of any administrative regulation dealing with substituting parties upon a worker's death.

The death statute, K.S.A. 2008 Supp. 44-510b, does not address this situation. Moreover, there is a question of whether that statute is applicable as there is no claim at this point that Ms. Hurlburt's death was related to her work-related injuries. Neither the permanent total disability statute, K.S.A. 44-510c, nor the scheduled injury statute, K.S.A. 44-510d, addresses the death of a worker. K.S.A. 44-510e, the permanent partial general disability statute, addresses a worker's death but merely states that any benefits due the injured worker at the time of death shall be paid to the employee's dependents or the worker's legal representatives. K.S.A. 44-510e(b) provides:

(b) If an employee has received an injury for which compensation is being paid, and the employee's death is caused by other and independent causes, any payment of compensation already due the employee at the time of death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of the death of such employee shall cease and be abrogated by the employee's death.

More importantly, when defining "workman," "employee," and "worker," the Act provides that any reference to an employee shall also refer to the employee's dependents and legal representatives if the employee is dead. K.S.A. 2004 Supp. 44-508(b) provides, in part:

Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator.

Upon Ms. Hurlburt's passing, Mr. Craig's authority to act upon Ms. Hurlburt's behalf also passed. Moreover, upon Ms. Hurlburt's death, there was no longer a claimant in this proceeding to pursue the benefits due and owing Ms. Hurlburt. Consequently, the Board finds a legal representative must be substituted in place of Ms. Hurlburt before this claim and appeal may proceed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and not necessarily any individual member's analysis of the law or facts. And the signatures below confirm this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board stays this appeal until a legal representative of Ms. Hurlburt's estate is substituted as the claimant.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Former Attorney for Claimant  
Lyndon W. Vix, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>5</sup> K.S.A. 2008 Supp. 44-555c(k).